

BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

Docket No. 2009-473-WS

In Re:)	
)	
Application of Tega Cay Water)	<u>RESPONSE TO TCWS' MOTION IN LIMINE</u>
Service, Inc. for Adjustment of)	
Rates and Charges and Modifications))	
to certain Terms and Conditions for)	
the Provision of Water and Sewer)	
Service.)	
_____)	

In response to TCWS' Motion in Limine to Preclude Certain Testimony of Gerald C. Hartman (Motion), City of Tega Cay, S.C. (City) respectfully submits the following.

I. Relevant Background

TCWS acknowledges that its Motion is untimely. (p.1, fn.1). But, TCWS asks the Commission not to enforce the Regs. because of the tight schedule in this matter. (Id.).

City filed answers to interrogatories and a response to TCWS's request for documents on June 10, 2010. Yet, TCWS waited until 4:46 p.m. on the Friday before a Tuesday merits hearing to complain about City's document production. TCWS had more than four weeks to communicate with City about its document production rather than waiting until the eve of trial.¹ City will produce any other information in its care, custody and control which has not already been produced (but it will have to work with TCWS for it to be more specific in order to accomplish this). And City has

¹ Thirty minutes later, at 5:16 p.m. on Friday, TCWS provided supplementary document production to City, yet City is not moving *in limine* to exclude TCWS's last minute attempt to avoid an adjustment for non-account water. Contested proceedings should be decided after full presentation of the evidence.

been in the same boat as TCWS and ORS with respect to the tight schedule in this matter. City's expert Hartman, just like TCWS, responded as timely and as quickly as he received and reviewed information in this matter.

II. Argument

A. Hartman's Surrebuttal Testimony is Proper.

"If the plaintiff . . . in reply puts new matter in evidence, or makes a new case different from that first made out, it becomes the right of the defendant to call witnesses in surrebuttal." State v. Watson, 353 S.C. 620, 579 S.E.2d 148 (Ct. App. 2003). See also State v. Summer, 55 S.C. 32, 32 S.E. 771, 774 (1899) ("As to matters that require explanation or as to new matters introduced by the opposing interest, a party has a right, in rebuttal, to re-examine his witness."); Camlin v. Bi-Lo, Inc., 311 S.C. 197, 200, 428 S.E.2d 6, 8 (Ct. App. 1993) ("A defendant has a right to respond to new evidence given in reply.").

Hartman's surrebuttal testimony is responding to new matters raised by the rebuttal testimony of Steve Lubertozzi. In his rebuttal testimony, Mr. Lubertozzi accepts several adjustments made by Christina Stutz, a witness for the Office of Regulatory Staff (ORS). (See Rebuttal Testimony of Steve Lubertozzi, pp. 2-3.) As a result of Mr. Lubertozzi's acceptance of these adjustments, it alters the proposed return on equity and rate of return that TCWS is seeking through this rate case. Such testimony makes the rate case now before the Commission different from that initially presented. As a result, City's witness, Mr. Hartman, had to examine the adjustments of Ms. Stutz and respond to the adjustments that were accepted by TCWS, especially those that addressed or affected the return on equity or the rate of return sought in this case.

As is made clear from the transcript of his surrebuttal testimony, Mr. Hartman is “updating his revenue recommendation” as a result of additional information provided by TCWS and ORS. Specifically, that additional information consists of adjustments made by ORS *that TCWS adopted*.² As a result of TCWS altering its direct testimony in response to that submitted by ORS, City has a right to call witnesses in surrebuttal to respond to such new evidence. Mr. Hartman’s surrebuttal testimony should be allowed as evidence.

B. City Produced Documents to TCWS in accordance with the Regulations addressing Discovery.

City has produced copies of all documents sought by TCWS through its document requests and interrogatories. In addition, this Motion (received electronically at 4:46 p.m. on Friday, July 9, 2010) is the first indication from TCWS that it believed City’s document production was incomplete. To ensure compliance with regulations governing discovery, City contacted its experts to make sure all documents had been provided. If TCWS believes something exists and is missing, it should ask City for it. In light of the Motion, City is further peppering Hartman to make certain all upon which he relied has been produced.

As for Mr. Hartman’s incorporation of Ms. Stutz’s adjustments, such incorporation was done after Mr. Hartman reviewed two years of annual reports provided to City by TCWS, in addition to other financial information provided by TCWS. It was not a simple blind acceptance of Ms. Stutz’s adjustments. Further, Mr. Hartman’s experience in accounting and financial evaluations of utilities

² TCWS assertion that it did not “prefile rebuttal testimony for any of its witnesses that addressed the return on common equity or overall rate of return sponsored by ORS witness Carlisle” is misleading. The rebuttal testimony of Mr. Lubertozi addresses clearly an adjusted return on common equity. He says specifically, “Using the noticed rates and the Company’s Rate base and adjustments previously discussed would generate an ROE of 9.60%.” (Rebuttal Testimony of Steve Lubertozi, p. 6, lines 15-16.)

is set forth on Exhibit GCH-1, which consists of a twenty page *curriculum vitae*. This CV demonstrates in detail that Mr. Hartman is qualified as an expert on the financial evaluations of utilities. Should TCWS have any questions as to Mr. Hartman's qualifications, it has the opportunity to address that through cross-examination. Disallowing the introduction of evidence on the bald and unsupported assertion Mr. Hartman is not an expert is an extreme and unreasonable result.³ TCWS' position on this is particularly ironic in that its related companies use Mr. Hartman as their expert from time to time.

Finally, City provided the documentation that Mr. Hartman relied upon to form his opinions regarding infiltration and inflow, which was attached to his direct testimony as Exhibit GCH-5. City provided a copy of this excerpt to counsel for TCWS on June 8, 2010, so TCWS has been in possession of this document for more than thirty days. The remainder of the study does not relate to infiltration and inflow, but, City will provide a copy of the entire study, should TCWS wish to review it. As a practical matter, TCWS received this information more than 10 years ago, but City is happy to provide it again.

III. Conclusion

Mr. Hartman's surrebuttal testimony is proper and within the boundaries set by caselaw. Such testimony is submitted in response to TCWS altering its case and seeking a lower return on equity and commensurate lower rate of return. City has the right to respond to such new evidence and altered position of TCWS. Further, Mr. Hartman's testimony should not be excluded because

³ Under South Carolina law, "[d]efects in an expert witness' education and experience go to the weight, not the admissibility, of the expert's testimony." Peterson v. Nat'l R.R. Passenger Corp., 365 S.C. 391, 399, 618 S.E.2d 903, 907 (2005). Even if the Commission believes Mr. Hartman is lacking in either education or experience, that belief goes to the weight, not the admissibility of his testimony.

City complied with all regulations regarding document production during discovery and, upon receiving such documents from its expert, immediately turned them over to TCWS. The Motion should be denied.

WHEREFORE, City hereby requests that the Motion be denied.

Charlotte, NC

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